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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIE GASTELLO,

Defendant and Appellant.

F037259

(Super. Ct. No. 0645502-6)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Brad Hill, Judge.

Elizabeth M. Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert A. Anderson, Senior Assistant Attorney General, and Michael J. Weinberger, Deputy Attorney General, for Plaintiff and Respondent.

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*Before Vartabedian, Acting P.J., Harris, J., and Levy, J.

Pursuant to a plea agreement, appellant Louie Gastello pled no contest to possession of a controlled substance for purposes of sale (Health & Saf. Code, § 11378; count 1),¹ sale of a controlled substance (§ 11379, subd. (a); count 2) and possession of a controlled substance (§ 11377, subd. (a); count 3) and admitted that he had suffered a prior “strike”;² served a prison term for a prior felony conviction (Pen. Code, § 67.5, subd. (b)); and suffered a prior conviction of violating 11351 (§ 11370.2. subd. (c)). The court imposed a prison term of 11 years, consisting of the four-year upper term on count 2, doubled pursuant to the three strikes law (Pen. Code, §§ 667, subd. (e)(1); 1170.12, subd. (c)(1)), and, purportedly, one year on each of three prior prison term enhancements. The court neither imposed sentence on nor struck the section 11370.2, subdivision (c) enhancement (prior drug conviction enhancement).

Appellant’s appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) After preliminary review of the record in this matter, we notified the parties, pursuant to Government Code section 68081, by letter of August 27, 2001 (August 27 letter), that we proposed to modify the judgment. Neither party having elected to brief the issues raised by our proposed disposition, and appellant not having responded to our earlier invitation to submit additional briefing, we, as discussed below, will modify the judgment as indicated in our August 27 letter, and remand for resentencing. As is further indicated in our August 27 letter, the trial court may lawfully impose a sentence consistent with the sentencing agreement depending upon its further findings on remand.

¹ Except as otherwise indicated, all further statutory references are to the Health and Safety Code.

² We use the term “strike” or “strike conviction” herein to describe a prior felony conviction that qualifies a defendant for the increased punishment specified in the Three Strikes law (Pen. Code §§ 667, subds. (b)-(i); 1170.12).

We first set forth the relevant procedural background. In addition to charging appellant with the substantive offenses to which appellant pled no contest, the information alleged that appellant had suffered three strike convictions, viz., two convictions of burglary (Pen. Code, § 459) in Kings County, in September 1981 and December 1981, respectively, and a conviction of robbery (Pen. Code, § 211) in Kings County in 1988. The information also alleged, “pursuant to” section 11370.2, subdivision (a), that appellant had suffered a prior conviction of violating section 11351. The information contained no prior prison term enhancement allegations.

Appellant executed a “Felony Advisement, Waiver of Rights, and Plea Form” (plea form) in which he indicated that he would “admit prior H & S 11351 per H & S 11370.2(a)” (Unnecessary capitalization omitted.) He also indicated in the plea form that he would admit that he served separate prison terms for convictions of the following: (1) first degree burglary (Pen. Code, §§ 459; 460, subd. (a)), in Kings County Case no. 5888 in September 1981; (2) second degree burglary (Pen. Code, §§ 459; 460, subd. (b)), in Kings County case No. 6858 in December 1981; and (3) robbery (Pen. Code, § 211), in Kings County case No. 9146 in November 1988.

At the outset of the change of plea proceeding on July 27, 2000, the court granted the prosecution’s motion to strike two of the strike allegations, viz., those based on appellant’s burglary convictions, and to allege, pursuant to Penal Code section 667.5, subdivision (b), that he had suffered those convictions and served a separate prison term for each. Later in the proceeding, appellant answered in the affirmative when asked if he admitted “a prior H & S 11351, pursuant to 11370” [*sic*]. With respect to the prior prison term enhancement allegations and the single strike allegation, the following exchange took place:

“[The court]: And a prior 459, pursuant to . . . 667.5 (b), in Kings County Case No. 5888 and 6858, on 9/10/81. [¶] You’re admitting that at this time?

“[Appellant]: Yes, I am.

“[The court]: And it’s also dated 12/20/81. And the further prior 211, pursuant to [three strikes law], Kings County 9146, on 11/10/88; correct?

“[Appellant]: Yes.”

Based on the information, the plea form and the proceedings at the plea proceeding, we conclude as follows: no prior prison term enhancements were initially alleged; appellant, as part of the plea agreement, agreed to admit three such enhancement allegations; and the court granted the prosecution’s motion to amend the information to allege two such allegations. However, based on the exchange quoted in the preceding paragraph, and specifically on the court’s reference in the singular to “a prior 459” on a single date, viz., September 10, 1981, we further conclude that appellant admitted only one prior prison term enhancement allegation. Therefore, a lawful sentence could include no more than one prior prison term enhancement, and the imposition of sentence on three such enhancements constituted an unauthorized sentence.

Moreover, the sentence imposed by the court was unauthorized for a second reason, viz., the court failed to impose sentence on or strike the prior drug conviction enhancement, pursuant to section 11370.2, subdivision (c). (*People v. Irvin* (1991) 230 Cal.App.3d 180, 190-192 [failure to either strike or impose an enhancement allegation that has been admitted or found true results in an unauthorized sentence].)

We recognize that the People, in the information, and the court, at the change of plea proceeding, referred to subdivision (a) of section 11370.2, which provides that any person convicted of certain enumerated drug-related offenses, who has suffered a prior conviction of certain offenses, including violating section 11351, shall receive a three three-year enhancement.³ We recognize further that appellant admitted a prior section

³ Further references to subdivisions are to subdivisions of section 11370.2.

11351 conviction. However, the subdivision (a) enhancement is not applicable in the instant case; it applies only where a defendant is convicted of violating, or conspiring to violate, section 11351, 11351.5 or 11352. Appellant stands convicted of none of these offenses.

Subdivision (c), on the other hand, applies where, as here, a person who has suffered a prior section 11351 conviction is convicted of violating sections 11378 and/or 11379. Notwithstanding the incorrect designation of the applicable subsection of 11370.2, appellant's admission of the prior section 11351 conviction subjects him to the subdivision (c) enhancement.

Our independent review of the record has revealed no other reasonably arguable legal or factual issues.

DISPOSITION

The judgment of conviction is affirmed, except to modify the judgment to reflect appellant admitted but one enhancement under Penal Code section 667.5(b), and that his admission, pursuant to the enhancement provisions of section 11370.2, comes under subdivision (c). The sentence is vacated, and this matter is remanded for proceedings not inconsistent with this opinion.